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No. 82-398

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents have failed to confront the most fundamental of the questions presented by this case: whether an agency may rescind a rule—particularly one that has not yet gone into effect—because changed circumstances have produced substantial uncertainty that the rule will produce the benefits on which its initial promulgation was premised. The court of appeals held that such uncertainty is insufficient to support rescission and that the agency must go further and affirmatively establish to the satisfaction of the reviewing court that the rule will *not* produce the benefits once anticipated (Pet. App. 51a). Rather than addressing this issue, respondents attempt to avoid it by contending (State Farm Br. in Opp. 13-15; NAII Br. in Opp. 7-9) that the court of appeals decided the case on the basis of fact-

bound issues. Respondents are wrong. Neither NHTSA nor the court of appeals made the factual findings on which respondents' arguments largely rest. As is evident from its opinion, the court of appeals instead announced an unprecedented and potentially far-reaching legal principle.

1. The court of appeals recognized (Pet. App. 50a)[1] that NHTSA's conclusion that the passive restraint requirement of Modified Standard 208 did not satisfy the statutory criteria for a motor vehicle safety standard to remain in effect rested on three determinations: (1) that instead of complying with the passive restraint requirement by installing airbags in 60% of new cars, as Secretary Adams had assumed when he adopted Modified Standard 208 in 1977, most automobile manufacturers in fact planned to use detachable passive belts to satisfy the Standard (*id.* at 96a); (2) that a detachable belt, once detached, "becomes identical to a manual belt" (*id.* at 98a); and (3) that because of this attribute of detachable belts, NHTSA was confronted with "substantial uncertainty" regarding the increase in belt usage that could be anticipated if detachable passive belts were substituted for the manual belts now in most vehicles, and therefore "[could not] reliably predict even a 5 percentage point increase as the minimum level of expected usage increase" if the Modified Standard were to go into effect (*id.* at 101a, 102a and 104a).

The court of appeals expressly found that the first two findings on which the rescission was based were reasonable (Pet. App. 50a). With regard to NHTSA's third finding, the court of appeals similarly conceded that "[t]here may well be 'substantial uncertainty' about the seatbelt usage rates

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed in *Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, No. 82-354.

that can be predicted if detachable belts are widely used" (*id.* at 51a).[2] The court of appeals also did not question NHTSA's estimate that the costs of implementing Modified Standard 208 would exceed $1 billion annually, or NHTSA's interpretation of the Act as requiring that any potential safety benefits must be weighed against these costs (*id.* at 16a-17a).

Given the acknowledged uncertainty regarding the increased usage rates of seatbelts that could be expected under Modified Standard 208, it surely could not be thought "arbitrary" or "capricious" under any accepted definition of those terms for NHTSA to withdraw the passive restraint requirement before it took effect, rather than to impose its substantial costs and burdens on the motoring public and the automobile manufacturers. As we have explained in our certiorari petition (at 6-10, 18-21), NHTSA's decision not to proceed with the passive restraint requirement was "based on a consideration of the relevant factors" set forth in the statute itself; since the court sustained NHTSA's findings with regard to those factors, that decision plainly reflects no "clear error of judgment." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971).

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[2]Respondents do not dispute NHTSA's finding that detachable belts, once detached, are functionally equivalent to the manual belts now installed in most vehicles. They do dispute the other determinations upon which NHTSA relied in concluding that the Standard no longer satisfied the statutory criteria for a motor vehicle safety standard to remain in effect. Thus, they argue that there is "every reason to believe" that "most manufacturers" would install some device other than the detachable belts NHTSA had concluded would be used (State Farm Br. in Opp. 23), and that NHTSA was not in fact faced with "substantial uncertainty" regarding the increase in usage rates that would result if, as NHTSA determined, detachable belts were installed by most manufacturers (*id.* at 8, 13-14, 20, 23-24; NAII Br. in Opp. 8, 11-14). As explained in the text, however, the court of appeals did not find that these or any other determinations upon which NHTSA relied were arbitrary and capricious.

2. Because NHTSA's decision to rescind the passive restraint requirement clearly satisfied the arbitrary and capricious standard of judicial review under established precedent, the court of appeals' decision necessarily rests, contrary to respondents' contentions, on an application of the arbitrary and capricious standard that departs from established precedent. Thus, although the court acknowledged that the substantial uncertainty on which NHTSA largely based its rescission of the passive restraint requirement may have been well founded, the court nevertheless held that in proceeding on this basis, "NHTSA turned the question on its head and thus totally misdirected its analysis" (Pet. App. 51a). The court explained: "the question is not whether evidence shows that usage rates will increase by the necessary amount, but whether there is evidence showing they will not. NHTSA has some burden, in other words, to show that a regulation once considered to prevent deaths and injuries efficiently can no longer be expected to do so" (*ibid.*). And, the court continued, if NHTSA cannot meet this burden by relying on data reflecting the experience with the types of passive belts now in use, because those belts differ from the detachable ones manufacturers are expected to install, then "only a well justified refusal to seek more evidence could render rescission non-arbitrary" (*id.* at 52a-53a).[3]

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[3]Even if it were thought to be appropriate for NHTSA to conduct further studies or gather additional evidence in an effort to develop more concrete data regarding the likely usage rates of detachable belts and other passive restraint devices, the court of appeals nevertheless clearly exceeded its authority by requiring Modified Standard 208 to go into effect, in the face of the agency's professed doubts about the efficacy of the Standard, until any such studies or efforts are completed. The question whether manufacturers and consumers should be required to devote their scarce resources to such an expensive undertaking pending agency study is a matter uniquely within the competence of the expert agency to which Congress has entrusted these difficult issues of statutory policy; it is not a matter for the courts. If this Court sustains

Contrary to respondents' contentions, then, the court of appeals quite clearly has announced a rule of law requiring the agency affirmatively to show that a rule will not have its intended effect before it may be rescinded; in the court's own words, the agency's rescission of the rule must be found arbitrary and capricious if the agency "rested its decision only on 'substantial uncertainty' " (*id.* at 53a-54a).

Under this holding, the very doubts that concededly would have justified the agency in failing to promulgate a rule in the first instance do not justify the agency's withdrawal of the rule even before it has gone into effect. The court of appeals therefore has erected an unprecedented and wholly unwarranted judicial presumption against the exercise of the administrative flexibility that this Court has recognized agencies must possess in order to adapt their policies to changing circumstances. See, e.g., *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594-595 (1981).[4]

NHTSA's rescission of the Standard in light of current circumstances, NHTSA will of course remain free to reinstate a passive restraint requirement at some point in the future if further experience or studies show that such a requirement would satisfy the statutory criteria for a motor vehicle safety standard to be placed in effect. Indeed, NHTSA expressly so stated in its rescission decision. Pet. App. 115a-116a.

[4]Respondents' attempts (State Farm Br. in Opp. 13; NAII Br. in Opp. 2, 8) to defend the court of appeals' holding that NHTSA was required to point to evidence in the record, or develop such evidence, that Modified Standard 208 would *not* produce net benefits are unavailing. This Court has made clear that there need not be any testimonial or documentary evidence in the record that an agency's forecast of future events will come true, because such a forecast "necessarily involves deductions based on the expert knowledge of the agency." *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961); see also *FCC* v. *WNCN Listeners Guild, supra*, 450 U.S. at 595-596. A fortiori, where, as here, an agency concludes that a prior forecast of public benefit is of doubtful validity and merely seeks to withdraw a burdensome rule premised on that forecast, the agency cannot be precluded from acting because it has been unable to go further and actually develop evidence to prove that the forecast is not only of questionable validity, but is actually wrong.

3. The only decision of this or any other Court that respondents cite in support of this unprecedented ruling is *Atchison, T. & S. F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973). See State Farm Br. in Opp. 14-15. State Farm quotes that portion of the opinion of four Justices which states that a "settled course of [agency] behavior" creates a "presumption" that the congressional policies will be carried out best if the settled rule is adhered to and that "[f]rom this presumption flows the agency's duty to explain its departure from prior norms" (412 U.S. at 807-808). This quotation is wholly inapposite here. NHTSA fully explained its decision to rescind the passive restraint requirement; respondents simply disagree with that explanation. Nothing in *Atchison, T. & S. F.* suggests the existence of a *substantive* impediment of the kind erected by the court of appeals in this case to an agency's modification of policy in light of changed circumstances. To the contrary, in the sentence immediately following those quoted by State Farm, the opinion emphasizes that "[t]he agency may flatly repudiate [prior] norms, deciding, for example, that changed circumstances mean that they are no longer required in order to effectuate the congressional policy." 412 U.S. at 808.

Moreover, there hardly has been a "settled course of [agency] behavior" by NHTSA over the years regarding the *mandating* of passive restraints, despite the efforts of respondents to create that impression. See State Farm Br. in Opp. 2-5; NAII Br. in Opp. 8. Although NHTSA has considered the issue of automatic restraints since 1969, no requirement that such devices be installed has ever gone into effect. Such a requirement was adopted in 1971 with an August 15, 1973 effective date. 36 Fed. Reg. 4600. In 1972, the deadline for compliance was delayed for two years, and manufacturers were given the option in the interim of installing manual belts with ignition interlocks. 37 Fed. Reg. 3911. This standard was invalidated because of defects in

testing criteria. *Chrysler Corp.* v. *Department of Transportation*, 472 F. 2d 659 (6th Cir. 1972). Although the testing criteria were corrected in 1973, albeit without setting a new effective date (38 Fed. Reg. 20449), the automatic restraint requirement was revoked in 1975 (40 Fed. Reg. 33977), and Secretary Coleman extended the period for use of the optional alternatives indefinitely in 1976 because of widespread public resistance to mandatory automatic restraints. 42 Fed. Reg. 5071 (1977). Secretary Adams' promulgation of Modified Standard 208 in 1977 therefore represented a break with this position. Thus, with the exception of the periods from 1971 to 1972 and from 1977 to 1981, when a mandatory restraint requirement was in place for the *future*, the issue has at most only been under consideration by the agency or, as in the period following Secretary Coleman's decision and now, subject to an affirmative judgment that automatic restraints should *not* be mandated under prevailing conditions. Further, NHTSA has not abandoned its support of passive restraints. Such restraints remain one means of compliance with Standard 208 (49 C.F.R. 571.208/S4.1.2.1), and NHTSA could reinstate a mandatory passive restraint requirement at some point in the future if further developments warrant.

4. Nor, contrary to the intimations of respondents' argument (State Farm Br. in Opp. 4; NAII Br. in Opp. 4, 5-6, 8, 9-10, 15, 16), can NHTSA's rescission of the passive restraint requirement be said to conflict with a congressional mandate to implement such a requirement. Nothing in the Safety Act itself directs NHTSA to promulgate such a standard. Moreover, the legislative activities surrounding consideration of passive restraints, far from indicating a firm endorsement, demonstrate abiding congressional concern over the imposition of a passive restraint requirement. In particular, Congress in 1974 prohibited NHTSA from requiring use-compelling continuous buzzers or ignition

interlocks, because of adverse public reaction (15 U.S.C. 1410b(b)(1)), and subjected any passive restraint requirement that could be satisfied by airbags to augmented rulemaking procedures and a two-House legislative veto device (15 U.S.C. 1410b(b)(2), (b)(3) and (c)). Subsequently, Congress prohibited the expenditure of appropriated funds for the implementation of a passive restraint standard involving airbags. Pub. L. No. 95-335, Section 317, 92 Stat. 450; Pub. L. No. 96-131, Section 317, 93 Stat. 1039. Moreover, although Congress has explicitly required other safety standards (e.g., 15 U.S.C. 1392(i), 1421 *et seq.*), bills mandating passive restraint systems have not been enacted. See, e.g., H.R. 3237, 97th Cong., 1st Sess. (1981); H.R. 1019, 95th Cong., 1st Sess. (1977). It is true that Modified Standard 208 was not vetoed by Congress when it was promulgated in 1977. See Pet. App. 36a-37a. But even assuming that Congress' failure to act in such circumstances properly could be viewed as an affirmative approval of the Standard at that time,[5] there is no reason to believe that Congress would not be of a different view today in light of the changed circumstances that led NHTSA to reconsider and rescind the rule.

5. Finally, respondents contend (State Farm Br. in Opp. 12-13, 16-22; NAII Br. in Opp. 2, 10, 14) that NHTSA's rescission of the automatic restraint requirement in view of the uncertainty whether usage rates would increase with detachable belts was arbitrary and capricious because NHTSA should have considered the alternative of barring compliance with the Standard by the use of detachable belts. This argument is misplaced for a variety of reasons.

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[5]But see Brief for the Immigration and Naturalization Service at 42-43, in *INS* v. *Chadha*, No. 80-1832 (1981 Term).

First, State Farm errs in giving the impression (Br. in Opp. 7, 19) that detachable belts were the result of a "new" design developed at the "eleventh hour" to satisfy Modified Standard 208. In fact, it has long been understood that detachable belts would satisfy the Standard.[6] The changed circumstances confronting NHTSA in 1981 resulted principally from its finding that the overwhelming majority of vehicles would be equipped with such belts, rather than air bags, as previously thought.

Second, as State Farm concedes (Br. in Opp. 21-22), NHTSA in fact did discuss in its decision whether it should require some use-compelling feature, such as continuous belts. NHTSA concluded that it should not, however, because of past congressional reaction (reflecting public reaction) against use-compelling features, public fears about being trapped, and possible complications of extrication following an accident (Pet. App. 109a-112a).

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[6]NHTSA initially considered but rejected the idea of requiring automatic belts to be non-detachable, because of concerns about occupant egress in emergency situations. 36 Fed. Reg. 12866 (1971). Therefore, the agency decided in early 1974 to require that automatic belts be fully detachable, by means of a push button release to permit easy exit, but with that release protected by an ignition interlock to discourage disconnection. 39 Fed. Reg. 14593 (1974). In response to the 1974 amendments to the Safety Act, 15 U.S.C. 1410b(b), the agency deleted the requirement for installation of an ignition interlock with either manual or automatic belts in late 1974. 39 Fed. Reg. 38380. This in effect once again required fully detachable automatic belts.

From 1974 until late 1978, the type of automatic belt contemplated by the standard was the fully detachable automatic belt. The automobile manufacturers obtained permission from NHTSA in late 1978 to experiment with non-detachable automatic belts. 43 Fed. Reg. 52493 (1978). None of these designs is fully detachable, and experience with all of them led their manufacturers to conclude that there would be serious public acceptability problems if such systems were installed in all of their cars. J.A. 305-306, 398-403, 1265-1266 (see Joint Appendix in the court of appeals).

Third, NAII blithely suggests (Br. in Opp. 10) that if NHTSA wished to solve the problems occasioned by the anticipated use of detachable belts, it "could simply have announced" that such belts no longer satisfy the Standard. However, NHTSA hardly could have ordered so fundamental a change in the Standard and eliminated the means of compliance being pursued by most manufacturers without extensive proceedings. Even if the court of appeals were correct in concluding that NHTSA should now consider whether a passive restraint rule should be adopted that *does not* permit compliance through the use of detachable belts, there was no basis for the court to mandate that a Standard that *does* permit compliance by such belts must remain in effect in the meantime.[7]

For the foregoing reasons and the additional reasons stated in the petition for a writ of certiorari, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Solicitor General

NOVEMBER 1982

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[7]As explained in our petition for a writ of certiorari (at 14-15), the court of appeals, in its August 4, 1982 order (Pet. App. 79a-80a), required Modified Standard 208 to remain in effect and stayed its effective date only until September 1, 1983, giving NHTSA until October 1, 1982 to inform it whether compliance may be achieved by September 1983. NHTSA informed the court by a filing on October 1 that, based on representations by manufacturers, it did not appear that substantial compliance could be achieved before September 1985. State Farm took the position that the manufacturers did not need until 1985 to comply, but urged the court of appeals not to act on NHTSA's filing until this Court either granted or denied the pending certiorari petitions. As of this filing, the court of appeals has not taken further action with respect to the stay of the effective date of the Standard.